Filed 10/26/16 Mid-Century Ins. Co. v. McPoland CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MID-CENTURY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

KATHRYN McPOLAND, et al.,

Defendants and Appellants.

F070775

(Super. Ct. No. 12CECG00041)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Magill Law Offices and Timothy V. Magill for Defendants and Appellants.

Hayes, Scott, Bonino, Ellingson & McLay, Lawrence M. Guslani; Becherer Kannett & Schweitzer, Lori A. Schweitzer and Scott M. Bloom, for Plaintiff and Respondent.

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This appeal arises from a dispute regarding insurance coverage following a motor vehicle accident. Plaintiff and respondent Mid-Century Insurance Company (Mid-Century) filed this action for declaratory relief seeking a determination that there was no coverage under an automobile insurance policy issued to defendants and appellants

Kathryn and James McPoland (collectively the McPolands),[1] for an accident Kathryn was involved in while driving James's employer-owned vehicle. The trial court agreed with Mid-Century and granted its motion for summary judgment on its complaint. Thereafter, Mid-Century filed a motion for summary judgment on the McPolands' cross-complaint that alleged various causes of action based on the denial of coverage, on the ground that the lack of coverage barred the McPolands' claims. The trial court again agreed with Mid-Century and granted the second summary judgment motion.

On appeal from the resulting judgment that incorporated the rulings on both motions, the McPolands contend (1) there were triable issues of material fact as to whether Kathryn was a permissive user under the insurance policy, (2) the trial court improperly ignored the McPolands' declarations filed in opposition to the summary judgment motion, (3) Mid-Century waived its ability to deny coverage, or is estopped from denying it, (4) the trial court erred in judicially noticing facts from previously filed court documents when ruling on the summary judgment motion on the cross-complaint, and (5) Mid-Century violated its duty of good faith and fair dealing by first accepting the McPolands' claim and then denying it later. Finding no merit to the McPolands' contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2008, Kathryn was driving a Chevrolet Impala owned by James's employer, Bridgestone Firestone (Bridgestone), when another driver rear-ended the Impala. The other driver was at fault and he paid out his automobile policy's $50,000 limit to settle a lawsuit the McPolands filed against him.

In February 2009, the McPolands submitted an underinsured motorist claim to Mid-Century under a policy in effect when the accident occurred. The policy issued to

[1] For clarity, we will refer to the McPolands individually by their first names. No disrespect is intended.

James covered his personal vehicle, a Honda Accord, and included underinsured motorist coverage that would cover Kathryn while driving the Accord, or even another vehicle.[2] The policy, however, excluded coverage for an insured person who "uses a vehicle without having sufficient reason to believe that the use is with permission of the owner."[3]

Kathryn and James had both signed a "Driver Acknowledgement Form" in November 2006, in which James acknowledged receipt of Bridgestone's "Company-Provided Vehicle Policy and Program" (the Bridgestone policy), and Kathryn acknowledged that the Bridgestone policy and program had been delivered to James. The Bridgestone policy provides, under the heading "**PERSONAL USE**": "The intent of a company-provided vehicle is to provide the teammate with a business tool to perform their job duties. Usage of the company-provided vehicle assigned to an eligible teammate is for the teammate only. [¶] Using the company-provided vehicle for vacation use or pulling personal recreational vehicles is not allowed. Vehicle is to be used by the teammate only and only within the teammate's residing place of residence."

In February 2009, Kathryn provided a recorded statement to Mid-Century as part of its investigation into the accident. Kathryn told the investigator that she was driving the Impala at the time of the accident, and they "had been requested for me not to drive it,

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[2] The policy's "General Statement of Coverage" for uninsured/underinsured motorist coverage provides: "We will pay all sums which an **insured person** or such other person as permitted under the law is legally entitled to recover as **damages** from the owner or operator of an **uninsured motor vehicle** because of **bodily injury** actually sustained by the **insured person** including the wrongful death of an **insured person**. The **bodily injury** must be caused by an **accident** and arise out of the ownership, maintenance or use of the **uninsured motor vehicle**."

[3] The policy defines an "**insured person**" for purposes of the uninsured motorist coverage provision only as: "1. You or a **family member**. [¶] 2. Any other person while **occupying your insured vehicle**. [¶] 3. Any person for **damages** that person is entitled to recover because of **bodily injury** to you, a **family member**, or another occupant of **your insured vehicle**." [¶] But, no person shall be considered an **insured person** if the person uses a vehicle without having sufficient reason to believe that the use is with permission of the owner."

but I didn't realize I was excluded from the insurance policy. So that's why our insurance for our vehicles are now picking up." When asked if she was an "excluded driver from this policy[,]" Kathryn responded, "Yes. Like I said, I just found out this morning." Kathryn also said that she never drove the car, and later in the interview added that she never thought their personal insurance would come into play because it was James's company car.

On April 30, 2009, Mid-Century, through its claims representative Ruby C. Fagan, advised the McPolands' attorney that coverage had been extended for the claim. In September 2010, the McPolands, through their attorney, submitted a demand for arbitration of their underinsured motorist claim. On December 21, 2010, another claims representative for Mid-Century, Shant Sarkissian, sent a letter to the McPolands' attorney in which he confirmed "coverage for underinsured motorist coverage under this policy." The acceptance was based in part on Kathryn's recorded statement.

In a September 2011 deposition taken as part of the arbitration, Kathryn testified that she knew she was not supposed to drive the Impala because it was a company car, but she drove it anyway so they would not have to move a child car seat from the Accord to the Impala. Instead, James drove the Accord so he could transport their two-year-old granddaughter, while Kathryn drove the Impala to work. Kathryn also testified that she signed a document around January 2008 that said spouses were not allowed to drive company vehicles under any circumstances, and following the accident, James was reprimanded because she was driving the Impala. Kathryn confirmed that at the time of the accident, she was aware she was excluded from driving the Impala. When asked if she knew she did not have permission to do so, Kathryn answered: "Only from him, not through the company." She did not make any claim for benefits under James's work vehicle insurance policy. James also was deposed; he testified he knew Kathryn was not allowed to use the Impala and he was unaware of any exception to this prohibition.

In November 2011, Mid-Century issued a reservation of rights letter based on Kathryn's deposition testimony that she was aware as of January 2008 that the Bridgestone policy did not allow spouses to drive company vehicles, which suggested she would not be considered an insured as she had sufficient reason to believe she used the Impala without Bridgestone's permission. It was only after Kathryn's and James's depositions that Mid-Century learned that the McPolands always were aware that Kathryn did not have permission to drive the Impala.

This Lawsuit

In January 2012, Mid-Century filed a complaint against the McPolands for declaratory relief. The following month, the McPolands filed a cross-complaint against Mid-Century in which they alleged the following causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) promissory estoppel; (4) violation of Business and Professions Code section 17200; (5) negligence; (6) fraud; (7) negligent misrepresentation; and (8) intentional infliction of emotional distress.

Summary Judgment on the Complaint

Mid-Century moved for summary judgment on the complaint in February 2013, on the ground that Kathryn did not qualify as an insured under the circumstances, and therefore there was no coverage for underinsured motorist benefits (the first motion). Specifically, Mid-Century argued there was no coverage because the policy definition of "insured persons" excludes any person who drives a vehicle without sufficient reason to believe he or she has the owner's permission to do so, and the McPolands both admitted in their depositions they knew Kathryn did not have Bridgestone's permission to drive the Impala.

In opposition, the McPolands first argued they created a triable issue of fact as to whether Kathryn had sufficient reason to believe she was using the Impala with Bridgestone's permission. They asserted the Bridgestone policy gave James permission to allow someone else to use the Impala to avoid violating the Vehicle Code or other

California laws, therefore James had implied permission to allow Kathryn to drive the Impala so he would not violate the Vehicle Code by transporting a child without a car seat. They further asserted their deposition testimonies were not controlling, as the questions they were asked called for legal conclusions. Finally, they argued Mid-Century either had waived the right to deny coverage, or was estopped from denying it.

They each submitted declarations in support of their opposition. Both Kathryn and James explained that on the day of the accident, they and their two-year-old granddaughter, who they had been taking care of, were at the hospital visiting their daughter, who was a patient. James was going to continue to babysit while Kathryn went to work, but the granddaughter's car seat was in Kathryn's car. Rather than take the time to move the car seat to the Impala, James gave Kathryn the keys to the Impala and he used Kathryn's car to take their granddaughter home.

James declared that when he gave his statement to Mid-Century in February 2009 and was deposed in September 2011, he had not reviewed the Bridgestone policy. When he reviewed both the "Driver Acknowledgement" that he signed and Bridgestone's policy following the death of his first attorney, David J. St. Louis, he realized he was mistaken as to his understanding regarding what he signed and the use of the vehicle; it was now clear to him that under the Bridgestone policy, he was not to operate a motor vehicle in any way that would cause him to fail to observe all traffic laws, including Vehicle Code section 27360, which provides that a child under eight is not to be transported in a motor vehicle unless secured in a proper, approved child seat. When he gave his statement to Mid-Century and was deposed, he was not aware of this policy provision.

Kathryn explained that she stated in her February 2009 recorded statement and September 2011 deposition that she did not believe she had the company's permission to use the Impala because she thought she had signed an acknowledgment in which she agreed not to use the vehicle. It was only after David St. Louis's death, when she reviewed Bridgestone's policy and the acknowledgment, that she realized she was

mistaken, and it was now clear to her that Bridgestone's policy prohibited James from operating a motor vehicle in a way which would cause him to fail and observe all traffic laws, including the Vehicle Code section that forbids transporting a child under age eight unless the child is secured in a proper, approved child seat. She was not aware of this prohibition when she gave her statement and deposition.

Both James and Kathryn knew it was against the law to transport their two-year-old granddaughter in a vehicle without an approved car safety seat or restraint system, and it was their intention not to have James violate any traffic law. Kathryn further declared that there were occasions before the April 2008 accident when she accompanied James on business trips and would drive his company car when he was too tired to continue driving.

In reply, Mid-Century argued that the Bridgestone policy, which the McPolands had submitted with their opposition, was inadmissible because it was not authenticated, and, even if admissible, did not create a question of fact as to whether Kathryn had sufficient reason to believe her use of the Impala was with Bridgestone's permission.[4] Mid-Century also argued that the undisputed material facts established that the McPolands' assertions of waiver and estoppel failed as a matter of law.

The trial court issued a tentative ruling for the January 30, 2014 hearing date, which it adopted as its order on January 31, 2014, after neither party requested oral argument.[5] The trial court granted the motion, finding that there was no coverage based

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[4] In a footnote, Mid-Century argues on appeal that the Bridgestone policy was not properly authenticated and should not have been admitted into evidence. We decline to consider this argument. (See *Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 160 ["We do not have to consider issues discussed only in a footnote."]; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562 [assertions raised only in a footnote may be properly disregarded]; Cal. Rules of Court, rule 8.204, subd. (a)(1)(B).)

[5] The hearing was originally set for May 8, 2013. The parties stipulated several times to continue the hearing, first to August 28, 2013 and then to December 10, 2013.

on the McPolands' deposition testimonies, as they understood Kathryn did not have permission to drive the Impala. The trial court rejected the McPolands' "strained interpretation" of Bridgestone's policy, namely that Kathryn had implied permission to use the Impala to avoid violating the Vehicle Code, since nowhere does the policy state that someone else can use the vehicle to avoid the teammate disobeying a traffic law. The trial court also rejected the McPolands' contention that their deposition admissions were inadmissible legal opinions, as well as their claims of waiver and estoppel. Finally, the trial court overruled all evidentiary objections. The court clerk mailed the trial court's minute order and ruling to the parties on February 5, 2014. A judgment on the complaint was not entered at that time.

Summary Judgment on the Cross-Complaint

On May 2, 2014, Mid-Century filed a motion for summary judgment on the McPolands' cross-complaint (the second motion). Mid-Century argued that because the trial court previously resolved the coverage issue in Mid-Century's favor by deciding that there was no coverage for the McPolands' underinsured motorist claim when it granted the first motion, the McPolands' claims alleged in the cross-complaint failed as a matter of law. In support of the motion, Mid-Century asked the trial court to take judicial notice of the evidence Mid-Century filed in support of the first summary judgment motion. The notice of motion stated that the motion was based on the notice, the attached memorandum of points and authorities, the separate statement, the request for judicial notice, the declarations of Dolores Bastian Dalton,[6] Larry Guslani and Mark Burger,[7] and

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In a stipulation filed on December 27, 2013, the parties stated they had stipulated to continue the hearing on the summary judgment motion from December 10, 2013 to January 9, 2014, but the stipulation was not filed until December 6, 2013. The parties agreed to the trial court vacating the December 9, 2013 tentative ruling, and continuing the hearing on the summary judgment motion to January 30, 2014. The McPolands' opposition was filed on January 16, 2014, and Mid-Century's reply on January 23, 2014.

[6] Dalton declared that she is an attorney with the law firm representing Mid-Century in this action, and one of the attorneys primarily responsible for handling Mid-

the evidence filed in support of the first motion,[8] copies of which were attached to the request for judicial notice.

In Mid-Century's separate statement of 20 undisputed material facts, the first 17 are identical to those contained in the separate statement filed in support of the first motion. Mid-Century added three facts to its separate statement for its second motion: (1) that it began this action by filing a complaint for declaratory relief seeking a judicial declaration that it did not owe any underinsured motorist benefits for the underlying claim; (2) the McPolands filed a cross-complaint against Mid-Century arising out of its denial of underinsured motorist benefits, with all claims purportedly caused by Mid-Century's denial; and (3) on February 5, 2014, the trial court served an order granting summary judgment in Mid-Century's favor on the complaint, as it decided Mid-Century did not owe any benefits as Kathryn was not an "insured person" under Mid-Century's policy, and rejected the McPolands' waiver and estoppel theories. The last three facts

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Century's defense to the cross-complaint. She stated that in February 2013, her firm's co-counsel, Larry Guslani, filed the first motion, and attached to the request for judicial notice filed with the second motion were true and correct copies of the evidence Mid-Century filed in support of the first motion, which Mid-Century was offering in support of the second motion. She also stated that a true and correct copy of the trial court's February 5, 2014 order granting summary judgment on the first motion was attached to the request for judicial notice.

[7] Guslani's and Burger's declarations were filed with the first motion. Among other things, Guslani authenticated the McPolands' deposition transcripts and the complaint. Burger authenticated the Mid-Century automobile insurance policy, the McPolands' recorded statements, the other driver's release of claims from the underlying lawsuit, and explained why Mid-Century first accepted the coverage claim and later denied it.

[8] The other evidence consisted of Mid-Century's insurance policy, the McPolands' February 2009 statements, transcripts of the McPolands' September 2011 depositions, the settlement agreement of the underlying claim, the November 2011 reservation of rights letter, the complaint, and the dismissal of the underlying action.

were based on the complaint, cross-complaint, and the trial court's February 5, 2014 order, all of which Mid-Century asked the trial court to take judicial notice of.

In opposition, the McPolands raised the same arguments as in their opposition to the first motion: (1) they had raised a triable issue of fact as to whether Kathryn had sufficient reason to believe she was using the Impala with Bridgestone's permission; (2) their admissions were not controlling; (3) their testimony constituted legal conclusions that could be contradicted by other facts or documents; and (4) Mid-Century had either waived denial of coverage or was estopped from denying it. In support of their opposition, the McPolands submitted new declarations that were identical to their prior ones, and the same documents as were submitted with their prior opposition.

The McPolands did not dispute that their cross-complaint arose out of, and their claims were based on, Mid-Century's denial of underinsured motorist benefits. They did, however, file a written objection to the use of the February 5, 2014 trial court ruling, arguing it should be overruled or ignored because they were denied due process when the trial court refused to allow oral argument on the first motion. They submitted a declaration from Rebecca A. Janzen, a legal assistant to the McPolands' attorney, who explained that when she saw the tentative ruling on the first motion, which was issued just before 4 p.m. on "December 9, 2013" for the hearing on "December 10, 2013," she called both the court clerk and the judge's clerk to request oral argument, but had to leave messages at both places. The court clerk returned her call first and said that because she called just after 4 p.m., the attorney should not appear at the hearing unless opposing counsel agreed, as the judge would not hear the matter. The judge's clerk also returned Janzen's call and said she could not help Janzen because she called her after 4 p.m. Janzen acknowledged she called the judge's clerk after 4 p.m. Janzen attempted to get opposing counsel's consent to oral argument, but never received a response.

In reply, Mid-Century argued it was entitled to summary judgment, as the McPolands did not address any of the issues raised in the motion and instead were

attempting to re-litigate whether they had a valid claim for coverage. Mid-Century pointed out that this issue had already been resolved by the trial court's February 5, 2014 order granting summary judgment to Mid-Century on its first motion, and asserted that since the court had already decided the policy did not cover the claim, the McPolands did not have any grounds to sue Mid-Century for bad faith.

The hearing on the second motion was held on July 17, 2014. The McPolands' attorney first raised an argument that he did not make in the opposition or response to the separate statement, namely that the trial court did not have any material facts before it, as Mid-Century could not ask the court to take judicial notice of documents for the truth of the facts stated in them, including the trial court's order. The attorney further argued that because all of the facts in the case which the trial court relied upon for its ruling were contested facts and a judgment had not been filed, the McPolands could contest the order. The McPolands' attorney also argued they were denied due process when they did not get the opportunity to orally argue the first motion, and therefore the trial court's order should not be utilized or relied upon in ruling on the second motion. Mid-Century's attorney responded that the McPolands were trying to create an improper motion for reconsideration of the prior court order and they did not submit any evidence with their opposition to indicate why Mid-Century's grounds for the motion were improper or there was a triable issue of fact on the issue of bad faith. Following argument, the trial court took the matter under submission.

On August 5, 2014, the trial court issued a written order granting summary judgment on the cross-complaint in Mid-Century's favor. With respect to Mid-Century's request for judicial notice of the documents filed with the first motion, the trial court took judicial notice of the fact that the documents existed in the file, but not the truth of their contents. Nevertheless, it considered the contents of the declarations and other evidence filed in support of the first motion because Mid-Century's notice of motion incorporated

by reference all documents filed in the case, including the evidence in support of the prior motion.

Based on the McPolands' deposition testimonies, the trial court found the McPolands could not prevail on the cross-complaint's bad faith claims because there was no potential for coverage under the policy since Kathryn knew at the time of the accident she was not a permitted user of the Impala. The trial court overruled the McPolands' objections to their own deposition testimonies and rejected the McPolands' argument that Kathryn's use of the vehicle was permitted under the company policy because that policy contains a clause requiring James to " 'observe and obey all traffic laws.' " The trial court found that, while the McPolands spent "considerable time" arguing they should be allowed to contradict or explain their prior admissions, their proferred evidence did not rebut their testimonies that they knew at the time of the accident that Kathryn was not allowed to use the Impala. The trial court also rejected the McPolands' argument that Mid-Century either waived or should be estopped from arguing there was no coverage.

The trial court stated that to the extent the McPolands argued the trial court's prior order was wrongly decided and based on misinterpretations of law or fact, those arguments could and should have been raised when the court issued the prior order or in a motion for reconsideration. The trial court rejected the McPolands' contention that they were denied due process, as Janzen admitted she did not speak with the clerk until after 4 p.m. on the day of the hearing. Finally, the trial court overruled the McPolands' objections filed with their opposition, as the objections were to the facts set forth in Mid-Century's separate statement rather than the evidence supporting those facts.

Judgment was filed on August 28, 2014 which stated the following: (1) Mid-Century's summary judgment motion came on for hearing on January 30, 2014 and, no appearance having been made, the tentative ruling was adopted as the court's ruling and the order served on the parties by mail on February 5, 2014; (2) Mid-Century's summary judgment motion came on for hearing on July 17, 2014 and, after oral argument, the

matter was taken under submission, with the trial court issuing its order on August 5, 2014; and (3) based on the court's ruling on Mid-Century's motions it was ordered that judgment be entered in Mid-Century's favor on (a) its complaint, that there is no coverage for uninsured/underinsured motorist benefits for the April 16, 2008 accident, and (b) the cross-complaint.

DISCUSSION

I. Standard of Review

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)[9] A plaintiff such as Mid-Century meets its burden as the moving party by proving each element of the "cause of action" entitling it to judgment. (*Id.*, subd. (p)(1); *S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 388; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) § 10:233, pp. 10–102.) A plaintiff moving for summary judgment need not disprove any defense asserted by the defendant: "All that the plaintiff need do is to 'prove [ ] each element of the cause of action.' " (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) If a plaintiff makes such a prima facie showing, the burden shifts to the defendant to demonstrate that a triable issue of material fact exists as to that cause of action or a defense thereto. (§ 437c, subd. (p)(1); *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411.) "The defendant . . . shall not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(1).)

[9] Subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

In contrast to a motion by a plaintiff, a moving defendant or cross-defendant can meet its burden by demonstrating that a cause of action has no merit, which it can do either by showing that one or more elements of the cause of action cannot be established or by establishing an affirmative defense to the cause of action. (§ 437c, subds. (o), (p)(2).)

On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) We review the trial court's decision de novo, considering all of the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) We liberally construe the opposing party's evidence, strictly construe the moving party's evidence, and resolve all doubts in favor of the opposing party. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

With these principles in mind, we address the McPolands' contentions regarding the grant of summary judgment on the complaint and cross-complaint.

II. Summary Judgment on the Complaint

Mid-Century's sole cause of action alleged in the complaint was for declaratory relief by which Mid-Century sought a declaration that it did not owe a duty to pay underinsured motorist benefits to the McPolands.

The Insurance Code requires an insurer to provide uninsured and underinsured motorist coverage in each bodily injury liability policy that covers liability arising out of the ownership, maintenance or use of a motor vehicle. (Ins. Code, § 11580.2, subds. (a)(1) & (2), (p)(7).) Here, the Mid-Century policy provides uninsured and underinsured motorist coverage to an "insured person[,]" which includes a family member such as Kathryn, but excludes from coverage a person who "uses a vehicle without having sufficient reason to believe that the use is with the permission of the

owner." Thus, the issue here is whether Kathryn had sufficient reason to believe she had the permission of the Impala's owner, Bridgestone, when she drove the car on the day of the accident.

An appellate court has interpreted similar policy language that provided coverage to any relative who used a non-owned vehicle "with the permission, or reasonably believed to be with the permission of the owner[,]" as importing a subjective standard for determining permission. (*Government Employees Ins. Co. v Kinyon* (1981) 119 Cal.App.3d 213, 219, 223-224 (*Kinyon*).) In *Kinyon*, a 15-year-old boy was in an accident while driving a pickup truck owned by his friend's grandparents. One of the passengers sustained personal injuries and sued the driver. The insurance company that issued the driver's father's automobile insurance policy filed a declaratory relief action seeking a determination of its rights and duties. The issue was whether the company was required to provide a defense and indemnification in the passenger's suit by virtue of the non-owned automobile clause, which by its terms applied to any relative who used a non-owned automobile " 'with the permission, or reasonably believed to be with the permission, of the owner.' " (*Id.* at pp. 216-217.) After a bench trial, the trial court determined the company was not obligated to defend or indemnify the driver or his father because the driver (1) did not have the express or implied permission of either the owners or their grandson to drive the pickup, and (2) did not have a reasonable belief that he had the owners' permission to drive it. (*Id.* at p. 217.)

Since the trial court found that neither the grandparents nor the grandson gave actual or implied permission to drive the pickup, the appellate court focused on whether the driver had a reasonable belief that his use was with the owners' permission. (*Kinyon, supra,* 119 Cal.App.3d at p. 220.) The appellate court concluded that the term "owner" was ambiguous and could include both the title owner as well as the possessor of the automobile "so long as the one driving the auto reasonably believes he has the permission of the owner to drive the vehicle." (*Id.* at pp. 221-223.)

With respect to the requirement that the driver have a "reasonable belief" that permission was given to borrow a non-owned vehicle, the appellate court compared express or implied permission, which focuses on the alleged owner's state of mind, with the language "reasonably believed to be with the [owner's] permission[,]" which focuses on the claimed permittee's state of mind. The question in the second circumstance is whether the permittee in fact believed, with reason, that the owner was willing, rather than whether the owner actually was willing, which was not legally significant. (*Kinyon*, *supra*, 119 Cal.App.3d at pp. 223-224.) Since "reasonable belief" imported a subjective standard for determining permission, the appellate court concluded that a sub-permittee, such as the driver, could be covered if he reasonably believed he had the owner's permission, transmitted through another permittee such as the grandson, to use the vehicle with the owner's permission, even if the grandson did not have the actual authority to transmit permission. (*Ibid.*) In light of this rule, the appellate court determined that there was no coverage, since the evidence showed that the driver could not reasonably have believed he had the grandparents' consent, transmitted through the grandson, as he knew who the owners were and that they had not given their consent. (*Id.* at pp. 224-225.)

Here, the policy language "sufficient belief" is akin to the reasonable belief language of the insurance policy in *Kinyon* and, in our opinion, calls for application of a subjective standard, namely whether Kathryn, the sub-permittee, had "sufficient reason to believe" she was using the Impala with the permission of the owner, Bridgestone, transmitted through James, the original permittee. The evidence presented below establishes that she did not have such belief, as Kathryn testified at her deposition that she knew she was not supposed to drive the Impala, she signed a document several months before the accident that said spouses were not to drive company vehicles under any circumstances, and she was aware at the time of the accident that she was excluded from driving the Impala. Kathryn also testified she knew from James that she did not

have permission to drive the car. James also testified that he knew Kathryn was not allowed to use the Impala. It is clear from Kathryn's and James's testimony that Kathryn drove the Impala believing Bridgestone did not permit her to do so. While James gave Kathryn permission to drive the Impala, Kathryn could not reasonably believe this was with Bridgestone's consent. Accordingly, Mid-Century satisfied its burden of showing that there was no coverage under the policy.

To avoid this result, the McPolands raise numerous arguments on appeal. First, citing Vehicle Code section 17150[10] and cases that address the issue of whether the driver is a permissive user of a car because the owner gave the driver express or implied permission to drive the car, the McPolands assert the permissive user issue is one of fact, which must be tested in terms of time, place and purpose, and requires examination of the owner's conduct and expectations, as well as the general relationship between the owner and driver.[11] The McPolands contend the permissive user standard utilized in these cases also applies here, rather than the subjective standard adopted in *Kinyon*.

The McPolands, however, ignore that whether an owner has given express or implied permission to use a vehicle is a different issue than whether the driver reasonably believed he or she had the owner's permission to use it. As explained in *Kinyon*, the first issue focuses on the owner's state of mind, whereas the second focuses on the driver's

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[10] Vehicle Code section 17150 provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

[11] The cases the McPolands cite are the following: *Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 51; *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1004-1005; *Fremont Comp. Ins. Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 674; *Hartford Accident & Indemnity Co. v. Abdullah* (1979) 94 Cal.App.3d 81, 90; *Elkinton v. CSAA* (1959) 173 Cal.App.2d 338, 344; and *Baker v. Liberty Mut. Ins. Co.* (9th Cir. 1998) 143 F.3d 1260, 1263.

state of mind. (*Kinyon, supra,* 119 Cal.App.3d at pp. 223-224.) Since the instant case involves the second issue, namely whether Kathryn had sufficient reason to believe she was using the Impala with the owner's permission, the permissive user cases that focus on the owner's state of mind are irrelevant.

The McPolands next contend that there are "numerous issues of fact to be determined" because the exclusion at issue here is not "conspicuous, plain and clear[,]" citing *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204-1205 (*Haynes*), and *Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1552.[12] They argue that the exclusion is ambiguous since there are two different definitions of permissive user in the policy – one in the liability section and the other in the uninsured motorist coverage provision.

The McPolands, however, never raised these contentions in the trial court, and therefore they cannot be considered for the first time on appeal. "Though this court is bound to determine whether [plaintiff] met [its] threshold summary judgment burden independently from the moving and opposing papers, we are not obligated to consider arguments or theories, including assertions as to deficiencies in [plaintiffs'] evidence, that were not advanced by [defendants] in the trial court. 'Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will . . . not be considered if it is raised for the first time on appeal. [Citation.] Specifically, in reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal.' [Citation.] 'A party

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[12] In *Haynes*, our Supreme Court held that a provision in an automobile insurance policy that purported to limit coverage for permissive users of an insured vehicle to the legal minimum was not sufficiently conspicuous, plain and clear to be enforceable. (*Haynes*, *supra*, 32 Cal.4th at p. 1202.)

is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' " (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 (*DiCola*).)

The McPolands did not argue in the trial court that the exclusion at issue here was ambiguous or that it was not conspicuous, plain and clear. Instead, they accepted the validity of the exclusion and argued that Kathryn qualified as an insured person for the underinsured motorist claim because she used the Impala having sufficient reason to believe her use was with Bridgestone's permission. Now they assert a triable issue of fact exists as to the meaning of the exclusion and whether it is conspicuous, plain and clear. "We agree princip[les] of forfeiture and 'theory of the trial' prevent [defendants] from making these arguments for the first time on appeal." (*DiCola, supra,* 158 Cal.App.4th at p. 677.)

The McPolands next argue the rule enunciated in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 (*D'Amico*), does not apply. "In *D'Amico*, the California Supreme Court held, ' "[w]here . . . there is a *clear and unequivocable admission* by the plaintiff, himself, in his deposition" ' and the plaintiff contradicts that admission in a subsequent declaration, ' "we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact." ' " (*Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 144 (*Ahn*).) "In a nutshell, the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522 (*Scalf*).) Thus, a party may not create a disputed issue of fact by contradicting his or her deposition testimony with an affidavit or declaration. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 177.) Where, as here, a party claims that her initial discovery responses were a mistake, the question is whether, in light of all the evidence adduced on the motion, a reasonable trier of fact could conclude the initial responses were a mistake

and the contradictory statements in the declaration credible. (*Ahn*, *supra*, 223 Cal.App.4th at p. 146.)

Here, the McPolands did not offer any credible, contradictory evidence to refute their admissions that they knew Kathryn did not have Bridgestone's permission to drive the Impala. Kathryn testified that she knew at the time she drove the Impala that she was not supposed to drive it because "[i]t's a company car, it's a company policy." When asked how long she knew company policy prohibited a spouse from driving the vehicle, Kathryn testified that she signed a document at the beginning of the year that stated "spouses were not allowed to drive the company vehicles" and confirmed that applied under any circumstances. She further confirmed that she was aware at the time of the accident that she was excluded from driving James's company vehicle.

In her declaration, Kathryn stated that she was mistaken when she made these statements because she thought she had signed an acknowledgement agreeing not to use the Impala. When she later reviewed the acknowledgment and Bridgestone's policy, however, it became clear to her that the policy prohibited James from operating the vehicle if it would cause him to fail to observe all traffic laws. She was not aware of this policy when she was deposed. In essence, she drove the Impala in order to keep James from violating a traffic law.

At best, Kathryn's declaration shows that she had implied permission to drive the Impala, but she was not aware of this permission until well after the accident. Even if true, her declaration does not create an issue of fact as to her belief at the time she drove the Impala. Instead, both her deposition testimony and declaration confirm that at the time of the accident, she did not have "sufficient reason to believe" she was using the Impala with Bridgestone's permission. The McPolands contend that their statements, both to the investigator and at their depositions, were inadmissible legal conclusions. But as the trial court found, the critical question is Kathryn's state of mind, and clearly both

Kathryn and James testified regarding what they understood and believed, which was that Kathryn did not have permission to drive the Impala.

The McPolands raise a number of other objections to the use of their deposition testimonies, namely that the questions asked misstated the evidence regarding permissive use under the Bridgestone policy and called for expert opinion. While the McPolands raised these same objections in their opposition brief to the motion, they were not in the form or format required by California Rules of Court, rule 3.1354(b), and were not "directed with precision to the testimony which the moving party desires the court to eliminate." (*Lucy v. Davis* (1912) 163 Cal. 611, 615.) Moreover, the McPolands forfeited any objections to the form of the question (or their answers) by failing to raise them at their depositions. (§ 2025.460, subd. (b).)

Finally, the McPolands contend that Mid-Century either waived its coverage defense or is estopped from asserting it, based on the two letters its claims representatives sent that affirmed coverage. We disagree.

Waiver and estoppel are two distinct and different doctrines that rest upon different legal principles. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59 (*DRG*).) "Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party." (*Ibid.*) Estoppel, however, " 'is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts.' " (*Ibid.*)

We begin with the McPolands' claim of waiver. A party asserting waiver must show with clear and convincing evidence that the opposing party knew the facts before relinquishing its right; "[t]he pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right." (*DRG*, *supra*, 30 Cal.App.4th at

p. 60.) "In the insurance context, California courts have applied the general rule that waiver requires the insurer to intentionally relinquish its right to deny coverage[.]" (*Ringler Associates, Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1188.) " ' "In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." ' " (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 (*DuBeck*).)

Here, there is not clear and convincing evidence establishing Mid-Century intentionally relinquished its coverage defense after full knowledge of the facts. In Kathryn's first recorded statement to Mid-Century in February 2009, she stated that she had been asked not to drive the car and had never driven it, but she only found out that morning that she was an excluded driver on the Impala's insurance policy. She also stated that she never thought the Mid-Century policy would come into play because the Impala was James's company car. In April 2009 and December 2010, Mid-Century advised the McPolands their claim was covered. In September 2011, Kathryn testified at her deposition that she knew she was not supposed to drive the Impala, she had signed a document that said spouses were not drive the car under any circumstances, and she was aware at the time of the accident that she was excluded from driving the Impala. Two months later, in November 2011, Mid-Century issued a reservation of rights letter as Kathryn's testimony showed she was not an insured since she had sufficient reason to believe she used the Impala without Bridgestone's permission.

This evidence shows that Mid-Century issued its initial coverage determinations based on Kathryn's statements that, while she was "requested" not to drive the Impala, she did not know she was excluded from the insurance policy on the Impala until the day of the interview. At that point, Mid-Century was aware that Kathryn knew she had been asked not to drive the car, but she believed she was insured under the Impala policy at the

time of the accident. From this, Mid-Century could conclude, as it did, that Kathryn had sufficient reason to believe she had Bridgestone's permission to drive the Impala; it had no reason to believe Kathryn was misstating her understanding. It was only after her deposition testimony, in which Kathryn unequivocally stated she knew at the time of the accident she was excluded from driving the Impala, that Mid-Century issued its reservation of rights letter. Since Mid-Century did not know essential facts until after it sent the original coverage letters, namely that Kathryn knew she was excluded from driving the Impala, its coverage determination was made without full knowledge of the true facts. Accordingly, Mid-Century did not waive its ability to deny coverage after Kathryn's deposition.

The McPolands contend that because Kathryn stated she had been "requested" not to drive the Impala, Mid-Century had a duty to investigate and uncover Kathryn's true belief, namely that she knew she was an excluded driver. In support, they cite *DuBeck, supra*, 234 Cal.App.4th 1254, and *Barrera v. State Farm Mut. Auto Ins. Co.* (1969) 71 Cal.2d 659. In *DuBeck*, the appellate court applied the principle that " 'actual knowledge of a breach of a policy provision is not essential to establish a waiver of a policy provision. It is sufficient if the insurer has information which if pursued with reasonable diligence would lead to the discovery of the breach.' " (*DuBeck, supra*, 234 Cal.App.4th at p. 1267.) The *DuBeck* court noted this principle was recognized in *Barrera*, where "the Supreme Court observed: " ' "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence." ' " (*DuBeck, supra*, 234 Cal.App.4th at p. 1267.)

The McPolands do not explain, however, what a further investigation would have uncovered, since Kathryn's belief was hers alone. Kathryn first told Mid-Century that she learned she was excluded from the Impala policy on the day she gave her statement,

some 10 months after the accident, and later testified she knew she was excluded from the policy before the accident. Any statement approving coverage before the deposition based on the information Kathryn provided in her recorded statement was made without full knowledge of the facts, and therefore the two letters stating coverage existed cannot be waivers.

For this reason, the McPolands' estoppel claim also fails. "Generally ' "four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." ' " (*Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 751.)

Here, Mid-Century was not apprised of the facts when it issued its initial coverage letters, as it was unaware that Kathryn believed she did not have Bridgestone's permission to drive the Impala. Mid-Century did not learn the true state of facts regarding Kathryn's belief at the time of the accident until her deposition. Therefore, the McPolands cannot establish estoppel.

In sum, Mid-Century satisfied its burden of demonstrating that the McPolands' underinsured motorist claim was not covered because Kathryn did not have sufficient reason to believe that she had Bridgestone's permission to drive the Impala on the day of the accident. Since the McPolands did not create a triable issue of fact on the coverage issue, the trial court did not err in granting Mid-Century's summary judgment motion and declaring that the McPolands' claim was not covered.

Summary Judgment on the Cross-Complaint

Based on the trial court's finding on the first motion that there was no coverage under the insurance policy, Mid-Century moved for summary judgment on the cross-complaint. On the second motion, the trial court found that because Mid-Century

properly denied coverage under the policy, the McPolands could not prevail on their cross-claims, which all were based on the allegation that Mid-Century improperly denied coverage for the accident, as there can be no action for breach of the implied covenant of good faith and fair dealing if there is no potential for coverage. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.)

On appeal, the McPolands do not assert that this finding is erroneous. Instead, they contend the trial court erred in granting the second motion because Mid-Century relied on judicially noticed pleadings and, without those pleadings, there was no evidence before the trial court to support the motion. Relying on *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548 (*Sosinsky*), the McPolands contend that the trial court improperly took judicial notice of the truth of the evidence that was filed in support of the first motion when deciding the second motion.

In its written order granting the second motion, the trial court noted the McPolands' objection to the court taking judicial notice of the documents filed in support of the prior motion, and stated that while it was taking judicial notice of the documents' existence in the file, it was not taking judicial notice of the truth of their contents. The trial court, however, stated it would still consider the declarations' contents and other evidence because Mid-Century's notice of motion incorporated by reference all documents filed in the case, including its evidence in support of the prior motion.

Section 437c, subdivision (b)(7), allows for incorporation by reference of any matter in the court's file if the matter being referenced is set forth with specificity. Here, the notice of motion, as well as the separate statement of undisputed material facts, specified the evidence to be incorporated, namely the same evidence submitted in support of the first motion. It is well settled that where other documents on file in the same action are incorporated by reference on a summary judgment motion, the trial court may examine those documents in ruling on the motion. (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 496 [court could consider documents that were incorporated by

reference into pleadings where notice of motion indicated reliance on all the files in the action]; *People ex rel. Mosk v. Lynam* (1967) 253 Cal.App.2d 959, 964-965 [court properly considered depositions and documents in the file where notice of motion stated it was made on all documents in the file, the deputy attorney general's declaration in support of the motion referred to the documentary evidence in the file, and prior request for preliminary injunction and motions for partial summary judgment also referred to such materials and evidence]; *Newport v. City of Los Angeles* (1960) 184 Cal.App.2d 229, 234-235 [since an affidavit may incorporate by reference other papers on file in the same action, court must examine previously filed documents which the affidavit incorporates].)

The cases the McPolands rely on are distinguishable, as they all involve an attempt to take judicial notice of the truth of contents of documents from other cases or evidence that was not offered within the action. (See *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223-1224 [noting that while an appellate court may take judicial notice of court records in other actions and official acts of state agencies, the truth of matters asserted in such documents is not subject to judicial notice]; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889 [while a court may take judicial notice of the existence of a website, it may not take judicial notice of its factual content]; *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1488, fn. 2 [while court may take judicial notice of existence of decision and the factual findings made in a related case, it may not take judicial notice of the truth of such findings]; *Herrera v. Deutsche Bank Nat. Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [court may not take judicial notice of the truth of matters stated in public records, such as a recorded assignment of deed of trust and substitution of trustee]; *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768 [denying request to take judicial notice of unrelated California cases involving punitive damages, as court cannot take judicial notice of the truth of hearsay statements in other decision or court files, or factual

findings made in another action]; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 369-370 [court may take judicial notice of the existence of a court ruling in another action, but not the truth of factual findings made therein]; *Sosinsky*, *supra*, 6 Cal.App.4th at p. 1551 [court may not take judicial notice of the truth of factual findings made by a judge who sat as the trier of fact in a previous case].)

Since the documents and evidence upon which Mid-Century relied in support of the second motion were incorporated by reference, the trial court properly reviewed and relied on that evidence in ruling on the second motion.

The McPolands raise only one other argument that is pertinent to the ruling on the second motion, namely their contention that Mid-Century violated its duty of good faith and fair dealing when it failed to make a prompt, fair and equitable decision regarding coverage. The McPolands assert they have shown that Mid-Century engaged in bad faith by not promptly and thoroughly investigating their claim, and unreasonably delaying processing of their claim.

Because the McPolands did not make this argument in opposing summary judgment, they cannot seek reversal of the judgment on this basis. (§ 437c, subd. (b); *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493 [party waives issue on appeal when underlying facts not included in opposition to summary judgment]; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 988-989 [party may not change theory of a cause of action on appeal and raise issue not presented in opposition to summary judgment].) Moreover, the McPolands do not explain how they can maintain a bad faith claim on this basis in the absence of coverage. (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151-1153 [delay in denying a claim cannot constitute bad faith if no coverage exists].)

In sum, the McPolands have not satisfied their burden of showing error with respect to the trial court's grant of summary judgment in Mid-Century's favor on the cross-complaint.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Mid-Century.

_____
McCABE, J.*

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
PEÑA, J.

* Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.